In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 220

JOSEPH PERKO, ELWYN WEST, MARTIN SKALA AND WILLIAM ZUPANCICH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 36–50, Sec. 1) is reported at 108 F. Supp. 315. The opinion of the Court of Appeals (R. 5–13, Sec. 3) is reported at 204 F. 2d 446.

JURISDICTION

The judgment of the Court of Appeals was entered May 25, 1953 (R. 12–13, Sec. 3). The petition for a writ of certiorari was filed July 31, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, under Section 4 of the Air Commerce Act of 1926, the President is authorized to create an airspace reservation other than for national defense purposes or for public safety purposes in the District of Columbia.

2. Whether Executive Order No. 10092, creating an airspace reservation over a portion of the Superior National Forest, is invalid as a taking of petitioners' property without due process of law.

STATUTES AND REGULATIONS INVOLVED

Section 4 of the Air Commerce Act of May 20, 1926, 44 Stat. 568, 570, 49 U. S. C. 174, provides as follows:

> SEC. 4. *Airspace Reservations.*—The President is authorized to provide by Executive order for the setting apart and the protection of airspace reservations in the United States for national defense or other governmental purposes and, in addition, in the District of Columbia for public safety purposes. The several States may set apart and provide for the protection of necessary airspace reservations in addition to and not in conflict either with airspace reservations established by the President under this section or with any civil or military airway designated under the provisions of this Act.

The pertinent portions of Executive Order No. 10092 dated December 17, 1949, 14 F. R. 7637

(R. 3–4, Sec. 1) and Sec. 1107 (i) (3) of the Civil Aeronautics Act of 1938, 52 Stat. 973, 1028, are set out in the Appendix, *infra*, pp. 10–12.

STATEMENT

In 1909 the Superior National Forest was created by a reservation of public lands for forest purposes pursuant to Section 24 of the Act of March 3, 1891, 26 Stat. 1095, 1103, 16 U. S. C. 471. It was thereafter extended by additional proclamations and by the purchase of privately owned lands. This reserve is located in the northern part of Minnesota and runs for many miles along the picturesque and historic boundary waters between this country and Canada. These waters, discovered and traveled by the early voyageurs, form a natural canoe route touching on one of the few remaining true wilderness areas in the United States. For this reason the Department of Agriculture, beginning in 1926, moved to protect the natural wilderness features of the region by creating "roadless areas" along the border lakes within the forest. In these designated areas lumbering activities were restricted and no roads were constructed (R. 7–14, Sec. 2). Only a small percentage of the "roadless areas," consisting primarily of isolated tracts, was or is privately owned (R. 5, Sec. 2). On the adjoining Canadian side, all of the land was reserved and left untouched as a part of the Quetico Provincial Park. In 1930, in order to preserve the wilderness character of

the area, Congress passed the Shipstead-Nolan Act of July 10, 1930, 46 Stat. 1020, 16 U. S. C. 577–577b, withdrawing all public lands from entry within designated parts of the forest and prohibiting any change in the water level of any lake or stream. In 1933 the State of Minnesota also prohibited construction of dams that would adversely affect the natural features of the area. Mason's Minn. Stat. Ann. § 110.13.

In the 1940's the rapid development of airplane travel into the area threatened to undo all prior accomplishments in preserving this wilderness country in its primitive state. Flights were made, not only to a few newly constructed resorts whose primary attraction was their isolated location deep in the Government preserved wilderness, but also to all lakes that afforded water surfaces adequate for landing. Consequently, pursuant to the provisions of Section 4 of the Air Commerce Act of 1926, 44 Stat. 568, 570, 49 U. S. C. 174, Executive Order No. 10092 was issued on December 17, 1949, creating an airspace reservation below the altitude of 4,000 feet above sea level over this wilderness described as the Superior, Little Indian Sioux and the Caribou Roadless areas. The order prohibited the navigation of aircraft within the airspace reservation after January 1, 1951, other than for certain excepted purposes of an emergency or official nature. It authorized the Secretary of Agriculture to prescribe appropriate

regulations and it permitted flights by private landowners within the area until January 1, 1952, provided air travel was the customary means of ingress and egress to such lands at the date of the order.

Three of the petitioners are operators of resorts within the area affected by the order. They acquired their isolated tracts of land in the 1940's, long after the roadless policy had been applied to the surrounding Government owned lands. The fourth petitioner is the owner of a small commercial aircraft business serving the resorts. Although the order did not become effective as to the petitioners until January 1, 1952, they continued to ignore its provisions even after that date and made regular flights in violation of its terms. On March 20, 1952, the United States filed an injunction proceeding against two of the resort owners and against the commercial airline owner. A similar action was thereafter filed against the third resort owner. The cases were consolidated for trial (R. 14–15, Sec. 1).

In the trial court the petitioners relied primarily on their assertion that the Executive Order was invalid. The court found that the order was a valid exercise of the President's power to create an airspace reservation under Section 4 of the Air Commerce Act of 1926 and that the order had been violated by all of the petitioners. A decree was entered on October 13,

1952 (R. 50–52, Sec. 1) enjoining further flights in violation of the order.[1] The Court of Appeals affirmed (R. 5–12, Sec. 3), holding specifically that the President's powers under Section 4 of the Air Commerce Act of 1926 were not limited to matters of national defense or of public safety in the District of Columbia.

ARGUMENT

The decision of the Court of Appeals is correct and presents no conflict of decisions or other reason calling for review.

1. Petitioners do not deny that preservation of the wilderness character of the forest area constitutes a governmental purpose. Basically, their position is that Section 4 of the Air Commerce Act of 1926 did not grant the President authority to creat an airspace reservation for "any and every governmental purpose" (Pet. 2). Thus, in the courts below,[2] they contended that, by application of the *ejusdem generis* rule, the President's powers to create an airspace reservation must be limited to national defense purposes or public safety purposes in the District of Columbia.[3]

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[1] In a separate, later proceeding, petitioners were found guilty of violating this injunction, and fines for that violation were imposed.

[2] Petitioners have failed to elaborate upon the questions they present in this Court.

[3] The pertinent provisions of the Act are "The President is authorized to provide by Executive order for the setting apart and the protection of airspace reservations in the United

However, as noted by both courts (R. 46–47, Sec. 1; R. 8–9, Sec. 3), the rule of *ejusdem generis* is merely a rule of construction which "should be applied cautiously and always with an eye to avoiding a construction at variance with the intention disclosed by the entire writing." It is never applied where, as here, the particular words embrace all the persons or objects of the class mentioned, leaving nothing *ejusdem generis* upon which the rule can operate. *Mason* v. *United States,* 260 U. S. 545, 553–554. Here, where the indications of the legislative history of the Act are that Congress did intend the words "and other governmental purposes" to cover more than merely "national defense" purposes (67 Cong. Rec. 9355; see also, H. Rept. No. 572, 69th Cong., 1st sess.; H. Rept. No. 1162, 69th Cong., 1st sess.), the rule is particularly inapplicable.

2. Petitioners claim that the order takes their property without due process of law. Since their lands have not been taken, and since their means of access by land and water is unaffected by the order, their argument must be based on a claim that the right to travel by air is a private property right which cannot be regulated by Congress. However, by Section 6 of the Air Commerce Act

States for national defense *or other governmental purposes* and, in addition, in the District of Columbia for public safety purposes." [Italics supplied.] The same section of the act also grants to the states the right to create such reservations.

of 1926, 44 Stat. 568, as amended by Section 1107 (i) (3) of the Civil Aeronautics Act of 1938, 52 Stat. 973, 49 U. S. C. 176, Congress had assumed complete control of the navigable airspace as part of the public domain (*United States* v. *Causby*, 328 U. S. 256), before petitioners acquired any interest in the properties. It is true that Section 3 of the Civil Aeronautics Act of 1938, 49 U. S. C. 403, recognizes a "public right of freedom of transit in air commerce." But, obviously, this was not the grant of a right to make non-regulable flights in the public domain, other sections of the act providing for strict regulation of flights.

In short, Section 4 of the 1926 Act specifically provides for the creation of airspace reservations when required for government purposes, and this reservation was created pursuant to that section. Accordingly, petitioners have failed to show that the Executive Order was unlawful or why they should not be enjoined from its continuing violation. See *Bailey* v. *Holland*, 126 F. 2d 317 (C. A. 4).

What petitioners may be arguing is not that the reservation was created in excess of constitutional power, but that they are entitled to just compensation for an alleged invasion of their property rights. While, for at least the reasons stated above, we seriously doubt that such rights exist, nevertheless, it is clear that a suit under the Tucker Act and not an injunction proceeding is

the proper method of litigating claims of just compensation. *Hurley* v. *Kincaid*, 285 U. S. 95, 103–104; *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18, 21; see *United States* v. *Causby*, *supra*.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1953.

[4] Petitioners' remaining contentions are frivolous. There is no question of an unconstitutional interference with intrastate commerce presented on this record. And the air ban has no adverse effect on the Webster-Ashburton treaty's guarantee that the then existing water communications along the boundary would remain open to citizens and subjects of both countries (R. 11, Sec. 3).

APPENDIX

The pertinent portions of Executive Order No. 10092 dated December 17, 1949, 14 F. R. 7637, R. 3–4 are as follows:

> By virtue of the authority vested in me by section 4 of the Air Commerce Act of 1926 (44 Stat. 570; 49 U. S. C. 174), and as President of the United States, it is ordered as follows:
>
> 1. The airspace below the altitude of 4,000 feet above sea level over the following-described areas in the counties of Cook, Lake, and St. Louis, State of Minnesota, is hereby reserved and set apart as an airspace reservation:
>
> Those areas of land and water within the exterior boundaries of the Superior National Forest which have heretofore been designated by the Secretary of Agriculture as the Superior Roadless Area, the Little Indian Sioux Roadless Area, and the Caribou Roadless Area, respectively, and which are more particularly described as follows:
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> * * * * *
>
> 2. After January 1, 1951, no person shall navigate an aircraft within this airspace reservation except in conformity with the provisions of this order and as permitted by or under the authority of regulations prescribed by the Secretary of Agriculture.
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> 3. Aircraft may be navigated within this airspace reservation when necessary for any of the following-described purposes:
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> (a) Making an emergency landing.

(b) Navigating when low-level flight is necessary for safety.

(c) Conducting or assisting in the conduct of official business of the United States, the State of Minnesota, or of Cook, St. Louis, or Lake County, Minnesota.

(d) Conducting rescue operations.

4. Subject to general regulations of the Secretary of Agriculture, aircraft may be navigated within this airspace reservation until January 1, 1952, for the purpose of direct travel to and from underlying private lands; provided that air travel was a customary means of ingress to and egress from such lands prior to the date of this order.

5. The Secretary of Agriculture shall carry out the provisions of this order, and for such purpose he is authorized to prescribe appropriate regulations.

6. Any person navigating an aircraft within this airspace reservation in violation of the provisions of this order will be subject to the penalties prescribed by the Civil Aeronautics Act of 1938 (52 Stat. 973), as amended.

Sec. 1107 (i) (3) of the Civil Aeronautics Act of 1938, 52 Stat. 973, 1028, provides as follows:

(i) The Air Commerce Act of 1926, as amended, is further amended—

* * * * *

(3) By striking out the first sentence of seection 6 and inserting in lieu thereof the following: "The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the air space above the United States, including the air space above all inland waters

and the air space above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction."

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